Petition

81-1923

Supreme Court, U.S.
FILED
APR 17 1982
ALEXANDER L. STEVAS
CLERK

NO.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1981

WILBERT E. BOLYEA,

Petitioner,

v.

STATE OF FLORIDA

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO
THE FLORIDA SUPREME COURT

Sheldon Gardner
William J. Stevens
Celeste Ebers Kralovec
FOSS, SCHUMAN & DRAKE
11 South LaSalle St.
Chicago, Illinois 60603
(312)782-2610

E. Glenn Tucker
RHODES & TUCKER
100 Collier Blvd.
P. O. Box 1146
Marco Island, FL 33937
(813)394-5151

QUESTION PRESENTED

WHETHER ARTICLE V, SECTION 3(b)(3) OF THE CONSTITUTION OF THE STATE OF FLORIDA (LIMITING APPEALS AS APPLIED) VIOLATES

A. THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND

B. THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

NO.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1981

WILBERT E. BOLYEA,

Petitioner,

v.

STATE OF FLORIDA

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO
THE FLORIDA SUPREME COURT

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	2
TABLE OF CONTENTS	3
TABLE OF AUTHORITIES	4
DECISIONS BELOW	6
JURISDICTIONAL STATEMENT	7
CONSTITUTIONAL PROVISIONS INVOLVED	8
STATEMENT OF THE CASE	10
ARGUMENT	14
APPENDIX	39

TABLE OF AUTHORITIES

Page

CASES

Ansin v. Thurson, 101 So.2d 808 (Fla. 1958).....15

Autrey v. Carroll, 240 So.2d 474 (Fla. 1970).....18

Douglas v. California, 372 U.S. 353, 9 L.Ed.2d 811, 83 S.Ct. 814, reh den 373 U.S. 905, 10 L.Ed.2d 200, 83 S.Ct. 1288 (1963).....32

Fein v. Selective Service, 405 U.S. 365, 31 L.Ed.2d 298, 92 S.Ct. 1062 (1972).....26

Foley v. Weaver Drugs, Inc., 177 So.2d 221 (Fla. 1965).....18,20,23

Greenholtz v. Nebraska Penal Inmates, 442 U.S. 1, 60 L.Ed.2d 668, 99 S.Ct. 2100 (1979).....26

Griffin v. Illinois, 351 U.S. 12, 100 L.Ed. 891, 76 S.Ct. 585 (1955), reh den 351 U.S. 958, 100 L.Ed. 1480, 76 S.Ct. 844 (1956).....32,34,35

Huguley v. Hall, 157 So.2d 417 (Fla. 1963).....18,20

TABLE OF AUTHORITIES

Page

Jenkins v. State, 385 So.2d 1356 (Fla. 1980).....12,13,20, ...22,23,27

Lake v. Lake, 103 So.2d 639 (Fla. 1958).....17,18, ...20,23

North Carolina v. Pearce, 395 U.S. 711, 23 L.Ed.2d 656, 89 S.Ct. 2072 (1969).....32

Reams v. State, 279 So.2d 839 (Fla. 1973).....10,23,24

SEC v. Chenery, 318 U.S. 80, 87 L.Ed. 626, 63 S.Ct. 454 (1942).....25

U.S. v. Forness, 125 F.2d 928 (2nd Cir. 1942).....25

Washington ex rel Oregon R & N Co. v. Fairchild, 224 U.S. 510, 56 L.Ed 863, 32 S.Ct. 535 (1911).....24

CONSTITUTIONAL PROVISIONS

U. S. Const., 14 Amendment.....8
Fla. Const., Art. 5, Sec. 3(b)(3).....8,11,14

DECISIONS BELOW

The Florida Supreme Court dismissed the Petition For Review on February 17, 1982. The decision is unreported. A copy of the Order is found in the Appendix, Page A-1*. The opinion of the District Court of Appeals for the Second District of Florida, affirming the judgment of the trial court was entered on January 13, 1982. A copy of that opinion is found in the Appendix, Page A-16. The jury verdicts of the Twentieth Judicial Circuit of Florida in and for Collier County County, Florida are found at Appendix, Page A-17-18.

*"A" refers to the Appendix of this Petition.

JURISDICTIONAL STATEMENT

The Petitioner invokes this Court's jurisdictional under 28 U.S.C., Section 1257(3). The order of the Supreme Court of Florida dismissing the Petition for Review was entered on Februry 17, 1982 at a time not recorded. This Petition will be timely if filed by mail on or before April 19, 1982 without extension.

CONSTITUTIONAL PROVISIONS INVOLVED

1. The Fourteenth Amendment to the United States Constitution, which recites in pertinent part:

> ...nor shall any State deprive any person of life, liberty, or property wihout due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

2. Article V, Section 3(b)(3) of the Florida Constitution which recites in pertinent part:

> (b) JURISDICTION - The Supreme Court
>
> * * *
>
> (3) may review any decision of a district court of appeal that expressly declares valid a state statute, or that expressly construes a provision of the state or federal constitution, or that expressly affects a class of or state officers, or that expressly and directly

conflicts with a decision of another district court of appeal or of the supreme court on the same question of law,...

STATEMENT OF THE CASE

Petitioner Wilbert E. Bolyea (hereinafter referred to as "Bolyea") was convicted of violating Florida Statutes §466.026(1)(a) and §466.035 on January 28, 1981. These statutes govern the practice of dentistry and dental laboratories in Florida. Bolyea appealed his conviction of the District Court of Appeals for the Second District of Florida. On appeal, Bolyea argued that the decision of the trial court expressly conflicted with the decision of the Florida Supreme Court in Reams v. State, 279 S.2d 839 (Fla. 1973), a case he had relied on in preparing his defense in the trial court. The District Court of Appeals for the Second District rendered an opinion on

January 13, 1982 which in its entirety, read, "AFFIRMED." (A-16). The Florida Constitution, Article V , Section 3(b)(3) sets forth the discretionary jurisdiction of the Florida Supreme Court. That provision states:

> (b) JURISDICTION - The Supreme Court
>
> * * *
>
> (3) may review any decision of a district court of appeal that expressly declares valid a state statute, or that expressly construes a provision of the state or federal constitution, or that expressly affects a class of or state officers, or that expressly and directly conflicts with a decision of another district court of appeal or of the supreme court on the same question of law,...

On February 11, 1982, Bolyea filed his notice of appeal invoking the discretionary jurisdiction of the Florida Supreme Court on the grounds that the decision of the District Court of Appeal for the Second District was in conflict with a decision of the Florida Supreme Court, and a decision of a Federal Court.

In addition Bolyea's notice and jurisdictional statement filed February 17, 1982, stated that the decision of the Florida Supreme Court in Jenkins v. State, 385 So.2d 1356 (Fla. 1980) which held that the Florida Supreme Court has no jurisdiction to review an appellate decision which is a per curiam affirmed decision, violates Bolyea's right to due process and equal

protection as guaranteed by the Fourteenth Amendment to the United States Constitution.

On February 17, 1982 Bolyea filed his jurisdictional statement in the Florida Supreme Court. On February 17, 1982, the Florida Supreme Court dismissed Bolyea's appeal on the gounds that under Jenkins v. State, 385 So.2d 1356 (Fla. 1980), it had no jurisdiction.

ARGUMENT

I. ARTICLE V, SECTION 3(b)(3) OF THE FLORIDA CONSTITUTION AS APPLIED TO APPELLANTS SEEKING REVIEW IN THE FLORIDA SUPREME COURT VIOLATES THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

Article V, Section 3(b)(3) of the Florida Constitution pertaining to the discretionary jurisdiction of the Florida Supreme Court states:

> (b) JURISDICTION - The Supreme Court
>
> * * *
>
> (3) May review any decision of a district court of appeal...that expressly and directly conflicts with a decision of another district court of appeal or the supreme court on the same question of law....

This provision was the result of amendments designed to limit the

discretionary jurisdiction of the Florida Supreme Court.

Prior to 1956, there were no District Courts of Appeal. They were created in 1956 by amendment to Article V of the Florida Constitution. The function of the Florida Supreme Court in view of these new District Courts of Appeal was to "supervise the judicial system for the state, exercising appellate power in certain specified areas essential to the settlement of issues of public importance and the preservation of uniformity of principle and practice, with review by the district courts in most instances being final and abolute." Ansin v. Thursin, 101 So.2d 808, 810 (Fla. 1958). (Emphasis added)

At the time the District Courts of Appeals were created, the Florida Supreme Court's certiorari jurisdiction was governed by Article V, Section 3(b) of the Florida Constitution. Section 3(b)3 stated at that time, that the Supreme Court of Florida

> may review by certiorari any decision of a district court of appeal that affects a class of or state officers, that passes upon a question certified by a district court of appeal to be of great public interest or that is in direct conflict with a decision of any district court of appeal or of the supreme court on the same question of law and any interlocutory order passing upon a matter which upon final judgment would be directly appealable to the Supreme Court and may issue Writs of Certiorari to commissions established by general law having statewide jurisdiction.

In Lake v. Lake, 103 So.2d 639 (Fla. 1958), the Florida Supreme Court construed the Florida constitutional amendment concerning certiorari jurisdiction to not allow review of per curiam affirmances of District Courts of Appeals rendered without opinion unless a restricted examination revealed a conflict had arisen with resulting injustice to the immediate litigant. The Florida Supreme Court in rendering this decision, was attempting to balance the appellant's interest in seeking a Writ of Certiorari based on direct conflict grounds and the court's interest in limiting its caseload while preserving uniformity of principal and practice. The Lake decision while limiting the jurisdiction of the Supreme

Court did not conclusively foreclose review of a per curiam affirmed decision rendered without opinion, by the Florida Supreme Court.

Subsequent to the Lake decision, the Florida Supreme Court began eroding the Lake decision by construing the presence of a concurring or dissenting opinion with a per curiam affirmance, sufficient to invoke certiorari jurisdiction. Huguley v. Hall, 157 So.2d 417 (Fla. 1963) (per curiam affirmance with dissenting opinion and case citations in majority opinion sufficient to invoke jurisdiction). Autrey v. Carroll, 240 So.2d 474 (Fla. 1970) (per curiam affirmance with dissenting opinion).

In Foley v. Weaver Drugs, Inc., 177 So.2d 221 (Fla. 1965), the Florida Supreme Court noted that:

> in actual practice this court has not been relieved of any substantial portion of its workload by the policy announced in the Lake case respecting per curiam decisions. The only practical distinction between our review of a per curiam decision without opinion, and one that is supported by an opinion, is that in the former we go directly to the 'record proper' to determine probable jurisdiction, whereas in the latter case we 'examine the opinion ... upon which the district court of appeal is based, and if the opinion on its fact, shows the probable existence of a direct conflict between the two decisions, on the same point of law, the writ of certiorari may issue...'

Id. at 223-24. The Foley court then considered its duty to keep the district courts of appeals' decisions harmonious and uniform and held that

> "this court may review by conflict certiorari a per curiam judgment of affirmance without opinion where an

> examination of the record proper discloses that the legal effect of such per curiam affirmance is to create a conflict with a decision of this court or another district court of appeal."

The Foley decision like the Lake decision did not foreclose review of all per curiam affirmances rendered without opinion. It is interesting to note that the Court acknowledged that they invited the District Court of Appeal, Third District, to write an opinion setting forth their reasoning in Foley, and the District Court declined.

Subsequent to the Foley decision, the Florida Supreme Court began questioning the Foley and Huguley decisions. Jenkins v. State, 385 So.2d 1356 (Fla. 1980) citing, Florida Greyhound Owners & Breeders Association, Inc. v. West

Flagler Associates, Ltd., 347 So.2d 408 (Fla. 1977); Golden Loaf Bakery, Inc. v. Charles W. Rex Construction Company, 334 So.2d 585 (Fla. 1976); AB CTC v. Morejohn, 324 So.2d 625 (Fla. 1975).

Finally, the Supreme Court of Florida urged the legislature to amend the Florida Constitution again, to limit the jurisdiction of the Supreme Court so that jurisdiction of the Florida Supreme Court to review per curiam decisions rendered without an opinion would be eliminated regardless of the existence of a concurring or dissenting opinion. This amendment took place on April 1, 1980 and the language adopted eliminated the words "by certiorari" and includes the words "expressly conflicts" as noted above.

The Florida Supreme Court in Jenkins v. State, 385 So.2d 1356 (Fla. 1980) then held that the Court lacks jurisdiction to review per curiam decisions of the district courts of appeal rendered without opinion regardless of whether they are accompanied by a dissenting or concurring opinion, when the basis for such review is an alleged conflict of that decision with a decision of another district court of appeal. Id. at 1359.

Thus, the Florida Supreme Court has interpreted the Florida Constitution to allow discretionary jurisdiction to some appellants based solely on whether the District Court of Appeals expresses or keeps secret the reasons for its judgment.

The Jenkins decision, unlike Foley or Lake, conclusively forecloses discretionary review of a decision of a district court of appeal rendered without an opinion. Such a restriction on the right of appellants to review in Florida denies due process of law to those appellants who do not receive a decision with a reasoned opinion. Permitting a tribunal to prevent review of its decision invites arbitrary action and frustrates the very purpose of an appeal - having a second tribunal take a look at what the first tribunal did to correct the first tribunal's errors. In the trial court, Bolyea prepared his defense by relying on the Florida Supreme Court's decision in Reams v. State, 279 So.2d 839 (Fla. 1973). The

Reams decision identified the elements that Bolyea would have to establish in order to prove he was excepted from the Florida Dental Practice. The trial court refused to follow Reams and rejected Bolyea's jury instructions based on this defense. The Appellate Court's failure to resolve the conflict that the trial court created and indeed affirm the conflict, has denied Bolyea due process.

At the core of due process is the obligation that courts act for good reason and avoid arbitrariness. Washington ex rel Oregon R.&N. Co. v. Fairchild, 224 U.S. 510, 524. Where the decision maker is not required to explain the reasons for his decision, the opportunity for arbitrary actions

increases. Judge Jerome Frank of the United States Court of Appeals for the Second Circuit said:

> It is sometimes said that the requirement that the trial judge file findings of fact is for convenience of upper courts. While it does serve that end, it has a far more important purpose - that of evoking care on the part of the trial judge in ascertaining the facts.... Often a strong impression that, on the basis of evidence, the facts are thus-and-so gives way when it comes to expressing that impression on paper.

United States v. Forness, 125 F.2d 928, 942 (2nd Cir.) (emphasis added). In S.E.C. v. Chenery Corp., 318 U.S. 80 at 94, 87 L.Ed. 626, 63 S.Ct. 454 (1942) the Supreme Court of the United States held "the orderly function of the process of review requires that the

grounds upon which the administrative agency acted be clearly disclosed. 318 U.S. 80 at 94 c.f.Fein v. Selective Service System, 405 U.S. 365 at 380, 31 L.Ed.2d 298, 92 S.Ct. 1062 (1972). Greenholtz v. Nebraska Penal Inmates, 442 U.S. 1 at 16 and 40-41, 60 L.Ed.2d 668, 99 S.Ct. 2100 (1979).

There are many judicial determinations which can be understood by a review of the record as a whole and where the litigants, the courts and the public can understand the unarticulated reasons for the determination. Such decisions would ordinarily satisfy the requirements of due process. Especially if the certiorari jurisdictions of the court is not dependent upon a written opinion. However, under Article V,

Section 3(b)3 of the Florida Constitution (Rule 9.030, Rules of Appellate Procedure; Jenkins v. State, 385 So.2d 1356) the discretionary jurisdiction of The Florida Supreme Court, where a conflict between the decision being reviewed and another decision of the Florida Supreme Court is alleged, depends on the reasons expressed by the District Court of Appeals. Thus the opportunity for arbitrary actions on the part of the decision maker because there is no written decision explaining the reasons for the decision is increased and dangerous in light of the Florida Constitution and cases construing it. This is an invitation to Courts of Appeals to ignore precedents of the

Court and Federal Courts and conclusively foreclose appellate review of their actions in violation of the Due Process Clause of the Fourteenth Amendment of the United States Constitution. The failure of the District Courts of Appeal to articulate the conflict and resolve the conflict is an abdication of their judicial responsibility, particularly when the District Courts are aware that their opinion can be reviewed no further. The abdication of judicial responsibility by the failure of the District Court of Appeal to render reasons for its decision is a denial of the Petitioner Bolyea's right to due process under the Fourteenth Amendment of the United States Constitution.

Requiring District Courts of Appeals to state reasons for their decisions would:

1. insure that the contentions of the parties were actually considered,

2. resolve or express any conflicts between the trial court's decision and precedents of the Florida Supreme Court,

3. insure that the result in the case may be justified by articulate reasons rather than arbitrary denial,

4. deter the District Court of Appeal from rendering a decision, in fact, in conflict with the precedents of the Florida Supreme Court and insulating that refusal

to follow precedent from review by the Florida Supreme Court by the expedient of not expressing the conflict.

The State sought to justify the limitation on the right to review as an effort to preserve uniformity of principle and practice. However, in practice the substantive law of the State of Florida may be in hopeless conflict. The District Court of Appeal may render conflicting per curiam affirmed decisions without reasons on a controversial issue. The Supreme Court of Florida under its present discretionary jurisdictional requirements would be helpless to resolve the conflict. Taken to its logical extreme the District Courts of Appeal could

usurp the supervisory capacity of the Florida Supreme Court by shielding itself from review by issuing only per curiam affirmed decisions without opinion in those cases they seek to affirm. There is no adequate state grounds for upholding the practice.

The District Court of Appeals should not be permitted to foreclose review of a decision which, in fact, conflicts with the precedents of this Court by simply refusing to articulate the conflict. Permitting District Courts of Appeals' decisions without reason denies due process of law to the Petitioner Bolyea.

II. ARTICLE V, SECTION 3(b)(3) OF THE FLORIDA CONSTITUTION AS APPLIED TO APPELLANTS SEEKING REVIEW IN THE FLORIDA SUPREME COURT VIOLATES THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

Under the equal protection clause of the Fourteenth Amendment to the Federal Constitution once a state establishes an appellate forum it must assure access to it upon terms and conditions equally applicable and available to all. North Carolina v. Pearce, 395 U.S. 711, 724, 23 L.Ed.2d 656, 89 S.Ct. 2072 (1969); Griffin v. Illinois, 351 U.S. 12, 100 L.Ed. 891, 76 S.Ct. 585 (1955), reh den 351 U.S. 958, 100 L.Ed. 1480, 76 S.Ct. 844 (1956); Douglas v. California, 372 U.S. 353, 9 L.Ed.2d 811, 83 S.Ct. 814, reh den 373 U.S. 905, 10 L.Ed.2d 200, 83 S.Ct. 1288

(1965). Where two appellants each claim that the trial court's decision conflicted with the decisions of the Florida Supreme Court they are part of the same class of appellants. When the Florida District Court of Appeals decides one of those cases and publishes an opinion explaining how its decision conflicts with opinions of other District Courts or of the Florida Supreme Court it grants that appellant a right to seek further review. If the District Court of Appeals affirms the other case without explanation, but its decision in fact conflicts with prior decisions of the Florida Supreme Court, the District Court of Appeals fails to provide an equality of appellate remedies to similarly situated appel-

lants in violation of the Equal Protection Clause of the Fourteenth Amendment.

In Griffin v. Illinois, 351 U.S. 12, 100 L.Ed. 891, 76 S.Ct. 585 (1955), reh den 351 U.S. 958, 100 L.Ed. 1480, 76 S.Ct. 844 (1956), this Court considered the State of Illinois' law that allowed an indigent defendant to obtain a free transcript to obtain appellate review of constitutional questions, but not other non-constitutional trial errors, except in capital cases. In determining that this law denied indigent appellants due process of law and equal protection, this Court noted that "destitute defendants must be afforded as adequate appellate review as defendants who have money enough to buy transcripts." Id at

19. Although Illinois was not constitutionally required to provide appellate review of criminal defendants' trials, once it did, it could not do so in a way which discriminated against poor people and still comply with due process and equal protection.

In the instant matter, the State of Florida's constitutional provision is a more offensive denial of equal protection and due process, because the State is discriminating against some appellants solely on the basis of the District Court of Appeals' actions in rendering a decision with or without an opinion. In Griffin, the State of Illinos did not preclude indigent defendants from filing an appeal, rather the practical requirement of paying for

a transcript in effect denied the indigents the opportunity to file a meaningful appeal. In the instant matter, the State of Florida is denying outright the petitioner, Bolyea, the opportunity to file an appeal with the Florida Supreme Court merely because the District Court of Appeals did not resolve and articulate the conflict Bolyea urged. Yet, another appellant has the opportunity to file an appeal merely because that defendant received a written opinion. There is no rational reason for foreclosing potential review of appellate court decisions rendered without an opinion and allowing potential review where decision is rendered with an opinion when the appellant has alleged a conflict with

decisions of the Florida Supreme Court or another District Court of Appeal. Therefore, appellants such as Petitioner Bolyea are denied equal protection of the law as guaranteed by the Fourteenth Amendment to the United States Constitution.

For the foregoing reasons, the Petitioner, Wilbert E. Bolyea, hereby prays that this Court issue its writ of

certiorari to review the Judgment of the Supreme Court of the State of Florida.

Respectfully submitted,

Sheldon Gardner
William J. Stevens
Celeste Ebers Kralovec
FOSS, SCHUMAN & DRAKE
11 South LaSalle St.
Chicago, Illinois 60603
(312)782-2610

E. Glenn Tucker
RHODES & TUCKER
100 Collier Blvd.
P. O. Box 1146
Marco Island, FL 33937
(813)394-5151

Counsel for the Petitioner

Appendix

APPENDIX

Page

TABLE OF CONTENTS

FLORIDA SUPREME COURT
ORDER 2/17/82.....A-1

JURISDICTIONAL STATEMENT
FILED 2/17/82.....A-2

DISTRICT COURT OF APPEALS OF
FLORIDA, SECOND DISTRICT COURT
ORDER 1/13/82.....A-6

CIRCUIT COURT JURY VERDICTS.....A-17,18

IN THE SUPREME COURT OF FLORIDA
WEDNESDAY, FEBRUARY 17, 1982

WILBERT E. BOLYEA	**	
Petitioner,	**	CASE NO. 61,720
vs.	**	District Court of Appeal, 2d
STATE OF FLORIDA,	**	District-No 81-397
Respondent.	**	

It appearing to the Court that it is without jurisdiction, the Petition for Review is hereby dismissed. Jenkins v. State, 385 So.2d 1356 (Fla. 1980).

No Motion for Rehearing will be entertained by the Court.

Sid J. White
A True Copy C
TEST:

cc: Hon. William A. Haddad, Clerk
Hon. William J. Reagan, Clerk
Hon. Charles T. Carlton Judge

Sid J. White
Clerk Supreme Court

By:
Deputy Clerk

E. Glenn Tucker, Esq. of Rhodes & Tucker
Sheldon Gardner, Esq. of Foss Schuman & Drake
Peggy Quince, Esq.

IN THE SUPREME COURT OF FLORIDA

WILBERT E. BOLYEA,	)	
	)	
Petitioner,	)	
	)	
v.	)	Case No.: 61, 720
	)	
STATE OF FLORIDA,	)	
	)	
Respondent.	)	

E. Glenn Tucker
RHODES & TUCKER
1000 Collier Blvd.
Marco Island, FL 33937
813/394-5151

Sheldon Gardner
William J. Stevens
Celeste E. Kralovec
FOSS, SCHUMAN & DRAKE
11 S. LaSalle Street
Chicago, Il 60603
312/782-2610

JURISDICTIONAL STATEMENT

JURISDICTIONAL STATEMENT

On appeal to the District Court of Appeal the petitioner argued that the decision of the trial court conflicted with the holding of the Supreme Court of Florida in Reams v. State, 279 So.2d 839 (Fla. 1973). The District Court of Appeal of Florida, Second District rendered an opinion which in its entirety read, "AFFIRMED." (A.1) In the absence of the Due Process and Equal Protection clauses of the 14th Amendment to the Federal Constitution this court would lack jurisdiction to grant review of that opinion. Jenkins v. State, 385 So.2d 1356 (Fla. 1980).

At the core of due process is the obligation that courts act for good

reason and avoid arbitrariness. Washington ex rel Oregon R.&N. Co. v. Fairchild, 224 U.S. 510, 524. Where the decision maker is required to explain the reasons for his decision the opportunity for arbitrariness diminishes. Judge Jerome Frank of the United States Court of Appeals for the 2nd Circuit said, "It is sometimes said that the requirement that the trial judge file findings of fact is for the convenience of upper courts. While it does serve the end, it has a far more important purpose - that of evoking care on the part of the trial judge in ascertaining the facts.... Often a strong impression that, on the basis if evidence, the facts are thus-and-so gives way when it comes to expressing

that impression on paper." United States v. Forness, 125 F.2d 928, 942 (2nd Cir.). In S.E.C. v. Chenery Corp., 318 U.S. 80 at 94 the Supreme Court of the United States held "the orderly function of the process of review requires that the grounds upon which the administative agency acted be clearly disclosed. 318 U.S. 80 at 94. c.f.Fein v. Selective Service System, 405 U.S. 365 at 380. Greenholtz v. Nebraska Penal Inmates, 442 U.S. 1 at 16 and 40-41.

Of course there are many judicial determinations which can be understood by a review of the record as a whole and where the litigants, the courts and the public can understand the unarticulated reasons for the determination. Such

decisions would ordinarily satisfy the requirements of due process. However, under Article V, Section 3(b)3 of the Florida Constitution (Rule 9.030, Rules of Appellate Procedure; Jenkins v. State, 385 So.2d 1356) the certiorari jurisdiction of this court depends on the reasons expressed by the District Court of Appeals. So long as this court permits District Courts of Appeals to ignore precedents of this court, by tolerating District Court opinions which deny appellate relief without explanation, this state invites arbitratriness and an abdication of judicial responsibility in violation of the Due Process clause of the 14th Amendment. Requiring District Courts of Appeals to state reasons for their decisions would:

1. insure that the contentions of the parties were actually considered,

2. resolve or express any conflicts between the trial court's decision and precedents of this court,

3. insure that the result in the case may be justified by articulable reasons rather than arbitrary denial,

4. deter the District Court of Appeal from rendering a decision, in fact, in conflict with the precedents of this court and insulating that refusal to follow precedent from review by this court by the expedient of not expressing the conflict.

The District Court of Appeals should not be permitted to foreclose review of a decision which, in fact, conflicts with the precedents of this Court by simply refusing to articulate the conflict. Permitting District Court of Appeals decisions without reason denies due process of law.

Permitting District Court of Appeals to decide some cases, where conflicting with the decisions of this court is claimed, without reasons, while other similar cases are decided by reasoned opinions, denies equal protection of the law to those who are not told why the District Court acted. Under the equal protection clause of the 14th Amendment to the Federal Constitution once a state establishes an appellate forum it must assure access to it upon terms and conditions equally applicable and available to all. North Carolina v. Pearce, 395 U.S. at 724; Griffin v. Illinois, 351 U.S. 12; Douglas v. California, 372 U.S. 353. Where two appellants each claim that the trial court's decision conflicted with

the decisions of this Court they are part of the same class of appellants. When the District Court of Appeals decides one of those cases and publishes an opinion explaining how its decision conflicts with opinions of other District Courts or of this Court it grants that appellant a right to seek further review. If the District Court of Appeals affirms the other case without explanation, but its decision in fact conflicts with prior decisions of this Court, the District Court of Appeals fails to provide an equality of appellate remedies to similarly situated appellants in violation of the Equal Protection clause of the 14th Amendment.

This Court should require the District Court of Appeals to render an

opinion. The record, in fact, discloses grounds for this Court to exercise its jurisdiction.

The jurisdiction of this Court is invoked to Rule 9.030(a)(2)(A)(i), 9.030(a)(2)(A)(ii) and 9.030(a)(2)(A)(iv). Rule 9.030(a)(2)(A)(i) allows discretionary review by the Florida Supreme Court of decisions of District Courts of Appeals that expressly declare valid a state statute.

In the trial court, in the instant matter, the defendant-petitioner, Wilbert E. Bolyea, moved to dismiss a two count complaint on the grounds that the statutes, upon which the complaint was based, Chapter 466.003(3) and 466.026(1), was unconstitutional.

(A.2)* The trial court denied the motion, thus expressly declaring the statute, The Florida Dental Practice Act, valid. The Appellate Court's affirmance of this decision allows this court to grant review of this decision pursuant to Rule 9.030(a)(2)(A)(i).

Rule 9.030(a)(2)(A)(ii) allows this court to review decisions of district courts of appeals that expressly construe a provision of the state or federal constitution. The defendant, Wilbert E. Bolyea, moved to dismiss the complaint in the lower court because the state statute, the Florida Dental Practice Act is an unconstitutional use of the police power of the State of

*A refers to Appendix.

Florida. The Florida Dental Practice Act, thus violates the rights of defendant-petitioner, Wilbert E. Bolyea, as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution. The trial court denied the motion to dismiss, thus construing the Fifth and Fourteenth Amendments to the United States Constitution as allowing Florida's excessive regulation. In addition, the trial court, contrary to England v. Louisiana State Board of Medical Examiners, 259 F.2d 626 (5th Cir. 1958), cert. denied, 359 U.S. 1010 (1959) and Schiller v. Illinois State Dental Society, No. 79-1529 (N.D. Ill. 1980), refused to allow the defendant-petitioner, Wilbert E. Bolyea,

the opportunity to prove the unconstitutionality of the Florida Dental Practice Act, as applied to him, by refusing to hold an evidentiary hearing on this issue. The District Court of Appeals' affirmance of this decision construing a provision of the federal constitution allows this court to grant review of this decision pursuant to Rule 9.030(a)(2)(A)(ii).

Rule 9.030(a)(2)(A)(iv) allows this court to review decisions of district courts of appeal that expressly and directly conflict with a decision of another District Court of Appeal or of the Supreme Court on the same question of law. In the trial court, Wilbert E. Bolyea's defense to the charge of illegal practice of dentistry was that

his acts constituted an exception to the Florida Dental Practice Act. This court recognized in Reams v. State of Florida, 279 So.2d 839 (Fla. 1973), that a defendant may establish that his activities are an exception to the Dental Practice Act. In support of his defense, Bolyea tendered a jury instruction (A4) which would have allowed the jury to determine as a question of fact, whether or not Wilbert E. Bolyea was excepted from the Dental Practice Act. The trial court refused to submit this instruction to the jury and as such refused to follow controlling precedent set by this court.

The District Court of Appeals by affirming per curiam, has refused to reconcile the decision and thus allowed

the trial court's decision which in contrary to this court's holding in Reams v. State to remain in conflict. Therefore, this court has jurisdiction to review the decision of the District Court of Appeals pursuant to Rule 9.030(a)(2)(A)(iv).

Respectfully submitted,

E. Glenn Tucker

E. Glenn Tucker
RHODES & TUCKER
1000 Collier Blvd.
Marco Island, FL 33937

Sheldon Gardner
William J. Stevens
Celeste E. Kralovec
FOSS, SCHUMAN & DRAKE
11 S. LaSalle Street
Chicago, Il 60603

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
SECOND DISTRICT

WILBERT E. BOLYEA,	)	
	)	
Appellant,	)	
	)	
v.	)	Case No. 81-397
	)	
STATE OF FLORIDA,	)	
	)	
Appellee.	)	

Opinion filed January 13, 1982.

Appeal from the Circuit
Court for Collier County,
Charles T. Carlton, Judge.

E. Glenn Tucker of Rhodes
and Tucker, Marco Island
and Sheldon Gardner of
Foss, Schuman & Drake,
Chicago, for Appellant.

Jim Smith, Attorney General,
Tallahassee and Peggy A.
Quince, Assistant Attorney
General, Tampa, for Appellee.

PER CURIAM.

Affirmed.

SCHED, C.J., RYDER and
SCHOONOVER, JJ., Concur.

IN THE CIRCUIT COURT OF THE
TWENTIETH JUDICIAL CIRCUIT AND FOR
COLLIER COUNTY, FLORIDA

STATE OF FLORIDA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Case No.
	)	80-121-CF-A-31
WILBERT E. BOLYEA,	)	
	)	
Defendant.	)	
	)	

JURY VERDICT

We, the Jury, find the Defendant Guilty of Practice of Dentistry without a License as charged in Count I.

_____
FOREMAN

DATE: August 5, 1980

IN THE CIRCUIT COURT OF THE
TWENTIETH JUDICIAL CIRCUIT AND FOR
COLLIER COUNTY, FLORIDA

STATE OF FLORIDA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Case No.
	)	80-121-CF-A-31
WILBERT E. BOLYEA,	)	
	)	
Defendant.	)	
	)	

JURY VERDICT

We, the Jury, find the Defendant Guilty of Advertising by an Unlicensed Person as charged in Count II.

_____
FOREMAN

DATE: August 5, 1980